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No. _____

IN THE

Supreme Court of the United States

October Term, 1980

JOHN LEE WHITT,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Questions Presented for Review

Petitioner's jury trial on charges of murder, *et al.* commenced April 10, 1980 and continued on April 11, 1980. On the evening of April 11, the trial judge became ill with the "flu" and was unable to preside at trial the following week. On April 17, 1980, a hearing was held before the Honorable Thomas J. Terputac, wherein the Court determined the trial judge's illness would continue through the next day (Friday) and "perhaps through Monday" (J.T.). Based upon this finding and over Petitioner's objection, the Court ruled that "manifest necessity" required the declaration of a mistrial. On May 1, 1980, the Petitioner filed a Motion to Quash the Indictment on the basis that the Petitioner's retrial would violate the Fifth and Fourteenth Amendments of the United States Constitution. The Motion was denied by the Court of Common Pleas of Washington County, Pennsylvania, on May 12, 1980. The Supreme Court of Pennsylvania affirmed the determination of the Court of Common Pleas on April 15, 1981.

The questions presented for review are:

(1) Whether the Supreme Court of Pennsylvania erred in intentionally, willfully, recklessly or negligently disregarding the decision of the Supreme Court of the United States in *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)?

(2) Whether the trial judge abused his discretion in finding that "manifest necessity" required the declaration of a mistrial so as not to bar Petitioner's subsequent prosecution?

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Cases and Statutes Cited	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of Facts	2
Reasons for Granting Writ of Certiorari	4
Argument	4
Point I. The Supreme Court of Pennsylvania erred in intentionally, willfully, recklessly or negligently disregarding the decision of the Supreme Court of the United States in *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L. Ed. 2d 717 (1978)	4
Point II. The trial Judge abused his discretion in finding that "manifest necessity" required the declaration of a mistrial so as not to bar the petitioner's subsequent prosecution.	5
Conclusion	10
Appendix A—Opinion of Court of Common Pleas on Motion to Quash Indictment (June 11, 1980)	1a
Appendix B—Memorandum—Order of Supreme Court of Pennsylvania Affirming Denial of Motion to Quash Indictment (April 15, 1981)	11a
Appendix C—Constitutional Provisions Involved	12a

Page

CASES CITED.

Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) 4,5,6,7,8,9
Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) 5
Carsey v. United States, 129 U.S. App. D. C. 205, 392 F.2d 810 (1967) 7
Commonwealth v. Ferguson, 446 Pa. 24, 285 A.2d 189 (1971) 9
Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (1975) 6
Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 8
Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 799 7
Illinois v. Sommerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973) 7
Roberts v. Louisiana, 431 U.S. 633, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977) 5
Simmons v. United States, 142 U.S. 148, 12 S. Ct. 171, 35 L. Ed. 968 8
State v. Linscott, _____ Me. _____, 416 A.2d 255 (1980) 4
Thompson v. United States, 155 U.S. 271, 15 S. Ct. 73, 39 L. Ed. 146 8
United States v. Dimitz, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 8
United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971) 5,6,7,8
Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 7

STATUTES CITED.

Pennsylvania Crimes Code:
Title 18, Sections 2501 and 2502 2

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

John Lee Whitt prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Pennsylvania, entered on April 15, 1981, which affirmed an Order denying a Motion to Quash the Indictment which was previously entered against Petitioner in the Court of Common Pleas of Washington County, Pennsylvania, on May 12, 1980.

Opinions Below

Following the entry of the Order in the Court of Common Pleas, the Petitioner appealed to the Pennsylvania Supreme Court. The *per curiam* affirmance of the Penn-

sylvania Supreme Court and the Opinion of the Court are set forth in Appendices A and B (1a-11a).[1]

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions Involved

This case involves Article 3, Section 1 (regarding the power of courts); Article 3, Section 2 (Appellate jurisdiction); The Fifth Amendment (due process of law and right not to be put in jeopardy of life or limb more than once); and Fourteenth Amendment (due process of law as applied to the States).

These Constitutional provisions are reproduced in Appendix C hereto.

Statement of Facts

On September 24, 1979, the defendant was charged with the crimes of Criminal Homicide and Murder, §2501 and §2502 of the Pennsylvania Crimes Code. On Tuesday, April 8, 1980, jury selection commenced before the Honorable John F. Bell. Jury selection continued through Wednesday, April 9, 1980.

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[1] The following abbreviations are used in the petition:

"a" is a reference to the Petitioner's Appendix which appears following the conclusion of the petition: The Appendix contains the opinion of the Court of Common Pleas of Washington County (Appendix A); the decision of the Supreme Court of Pennsylvania (Appendix B), and the applicable Constitutional Provisions involved.

"J" is a reference to the Record submitted to the Supreme Court of Pennsylvania which contains all the relevant matters of record.

On Thursday, April 10, 1980, and for one-half a day on Friday, April 11, 1980, the Commonwealth presented substantially all of its case before the judge and jury. The only remaining prosecution witnesses left to call were several State Police Troopers.

On Monday, April 14, 1980, the defendant and his counsel were advised that Judge Bell was ill and would not be able to perform his duties on that day. The Honorable Thomas J. Terputac ordered a continuance of the trial on a day to day basis, pending Judge Bell's return. On Thursday, April 17, 1980, after stating that he talked to Judge Bell and over the objection of the defendant's attorney, Judge Terputac, stating that he believed Judge Bell's illness would continue for at least one more day and possibly through the weekend, declared a mistrial and discharged the jury.

On May 1, 1980, the defendant presented a Motion to Quash the Indictment in this matter for the reason that a retrial of the defendant would be violative of the Fifth Amendment to the Constitution of the United States by subjecting him to double jeopardy.

On May 5, 1980, a Rule issued upon the District Attorney to show cause why the Motion should not be granted and the charges dismissed. By Order dated May 12, 1980, the defendant's Motion to Quash the information and the Motion to Dismiss were denied by Order of the Honorable Thomas J. Terputac.

On May 12, 1980, the defendant appealed to the Supreme Court of Pennsylvania which, by Order dated April 15, 1981, affirmed the decision of the Court of Common Pleas of Washington County, Pennsylvania, in a *per curiam* decision.

Reasons for Granting Writ of Certiorari

This petition raises substantial and important questions involving a State Court's failure to act in accordance with the decision of the Supreme Court of the United States in *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). The Writ, therefore, should be issued to protect the integrity of the Court's decision. Assuming the decision of the Supreme Court of Pennsylvania is not squarely controlled by the said case, the decision was made in a way probably not in accord with the applicable decisions of this Court and conflicts, or probably conflicts with the decisions of another State Court of last resort. See *State v. Linscott*, _____ Me. _____, 416 A.2d 255 (1980).

ARGUMENT

POINT I

The Supreme Court of Pennsylvania erred in intentionally, willfully, recklessly or negligently disregarding the decision of the Supreme Court of the United States in *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

As will be demonstrated, *infra*, the very essence of the decision in *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) is that a declaration of a mistrial for reasons of "manifest necessity" can only be properly made after the integrity of the fact finding process has been impugned. If the defendant objects to the declaration of a mistrial, the prosecution has the burden of proving that a danger to the integrity of the fact finding process exists.

In the present case, no such showing is possible. After trial had been delayed for only three days and, faced

with a delay of only one and (perhaps) two more business days, the Judge temporarily assigned to the case declared a mistrial. No jurors were questioned as to whether their ability to render a decision had been impaired. No other alternatives, such as substituting another Judge, were considered.

In this light, it is respectfully submitted that the decision of the Supreme Court of Pennsylvania squarely conflicts with the decision of this Court in *Arizona v. Washington, supra,* and requires reversal. *Roberts v. Louisiana,* 431 U.S. 633, 97 S. Ct. 1993, 52 L. Ed. 2d 637 (1977).

POINT II

The trial Judge abused his discretion in finding that "manifest necessity" required the declaration of a mistrial so as not to bar the petitioner's subsequent prosecution.

The question requires the application of law to fact.

The law is clear that retrial of a defendant on criminal charges is improper unless the previous trial was aborted on motion of the defendant or "manifest necessity" mandates the declaration of a mistrial. *United States v. Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971). This Fifth Amendment standard is applicable to State prosecutions. *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

In determining whether "manifest necessity" requires a declaration of a mistrial, the trial Judge must exercise his discretion, taking into account all the circumstances of the case. An abuse of that discretion will bar a retrial of the defendant. Any doubt should be resolved in favor of the liberty of the citizens; any other rule would result in an unlimited, uncertain and arbitrary judicial discretion. *United States v. Jorn, supra; Arizona v. Washington, supra.*

Although no hard and fast rules for determining when "manifest necessity" to declare a mistrial exist, certain guidelines must be followed by the trial Judge. The power to declare a mistrial should be used with the greatest caution, under urgent circumstances, and should be limited to very plain and obvious cases. In capital cases particularly, the trial Judge should be hesitant in interfering with any chance of liberty in favor of the defendant. *United States v. Jorn, supra; Commonwealth v. Robson*, 461 Pa. 615, 337 A.2d 573 (1975). It is the burden of the prosecution to establish "manifest necessity" for justifying a declaration of a mistrial to avoid the double jeopardy bar. *United States v. Jorn, supra; Arizona v. Washington, supra.*

The defendant respectfully submits that the case of *Arizona v. Washington, supra,* is controlling and mandates the dismissal of the charges presently pending against the defendant. In that case, this Court outlined the factors to be considered in determining the scope of the double jeopardy clause's protection by establishing a balancing test. This balancing test consists of weighing the public interest in having a just judgment reached by an impartial tribunal against the defendant's right not to suffer a subsequent prosecution. *Arizona v. Washington, supra.* This Court explicating the reasons for the bar upon subsequent prosecutions, has stated:

> Because jeopardy attaches before the judgment becomes final, the Constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits Constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved

> accusation of wrongdoing and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever trial is aborted before it is completed. Consequently, as a general rule, the prosecution is entitled to one, and only one, opportunity to require an accused to stand trial. *Arizona v. Washington*, supra, at _____ U.S. 503 _____ 504, _____ S. Ct. at 829 - 830 (footnotes omitted citing *United States v. Jorn*, supra; *Illinois v. Sommerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425; *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974; *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 799; *Carsey v. United States*, 129 U.S. App. D. C. 205, 392 F.2d 810 (1967)).

Using this approach, the essence of this Court's decision in *Arizona v. Washington, supra*, immediately appears. Only when the integrity of the fact finding process has been somehow impugned or threatened may a mistrial be declared. This conclusion is inevitable if a close analysis of the Court's opinion is made.

First, it must be noted that the Court's basic premise in deciding the case was that the defense counsel's opening remark to the jury was improper and may have affected the jury's impartiality. "We therefore start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury." *Arizona v. Washington, supra*, at _____ U.S. 511, _____ S. Ct. 833.

Second, the Court's opinion makes plain that the primary purpose of the decision is to maintain the integrity of the fact finding process. Thus, in discussing the "hung jury" situation which would justify the declaration of a mistrial for reasons of "manifest necessity," the Court notes:

> . . . there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an Appellate Court views the "necessity" for mistrial differently from the trial Judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. *Arizona v. Washington*, supra, _____ U. S. at 509-510, _____ S. Ct. at 832.

The other examples used by this Court, by way of illustration, reinforce this view. In discussing *Thompson v. United States*, 155 U.S. 271, 15 S. Ct. 73, 39 L. Ed. 146, this Court noted "the possibility of bias justified the mistrial." *Arizona v. Washington, supra*, at _____ U.S. 512, _____ S. Ct. 834. In discussing *United States v. Dimitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267:

> (the double jeopardy clause) bars retrial where bad faith conduct by Judge or prosecutor . . . threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. Thus, the strictest scrutiny is appropriate when the basis for this mistrial is the unavailability of prosecution evidence or where there is reason to believe that the prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over the accused (footnotes omitted, citing *Downum v. United States*, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100; *United States v. Jorn*, supra).

In discussing *Simmons v. United States*, 142 U. S. 148, 12 S. Ct. 171, 35 L. Ed. 968, this Court noted a mistrial was justified because "it (was) impossible for the jury to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties." *Arizona v. Washington, supra*, _____ U.S. at 512, _____ S. Ct. at 833-834.

Finally, after this Court's discussion of the cases noted above, the decision reinforced the analysis used herein by stating: "Neither party has the right to have his case decided by a jury which may be tainted by bias; in these circumstances 'the public's interest in fair trial designed to end injust judgments' must prevail over the defendant's 'valued right' to have his trial concluded before the first jury impaneled." *Arizona v. Washington, supra,* at _____ U.S. 516, _____ S. Ct. 835-836.

In the present case, it is respectfully submitted that no threat to the integrity of fact finding process has been demonstrated. Having continued the case for only three days (the equivalent of a holiday weekend) and faced with the absence of the trial Judge for only two more actual business days (at most) before the trial could be reconvened, the Order granting a mistrial for reasons of "manifest necessity" plainly constituted an abuse of discretion and effectively stripped the defendant of his right to have his case heard by his chosen tribunal. As has been stated by the Supreme Court of Pennsylvania: "Consequently, if the Commonwealth wished to overcome these doubts and to persuade the trial Court to engage in such an extraordinary exercise of the discretion, it should have offered more substantial evidence of the "manifest necessity" required for such exercise." *Commonwealth v. Ferguson,* 446 Pa. 24, 285 A.2d 189 (1971).

No evidence indicating a threat to the integrity of the fact finding process having been introduced by the State or appearing on the record, the defendant respectfully requests this Honorable Court to grant the Petition for the Writ of Certiorari and to reverse and remand this matter to the Supreme Court of Pennsylvania for a decision consistent with this Honorable Court's decision in *Arizona v. Washington, supra.*

Conclusion

For these and all the aforementioned reasons, the defendant respectfully requests this Honorable Court to enter an Order granting the petitioner's request for Writ of Certiorari and to reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Common Pleas on Motion to Quash Indictment (June 11, 1980).

IN THE COURT OF COMMON PLEAS
of Washington County, Pennsylvania

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

vs.

JOHN LEE WHITT,
Defendant.

No. 602 (a,b,c,d,e) of 1979
No. 1104 of 1979

APPEARANCES:

Herman J. Bigi, Esq., District Attorney, and James N. Brady, Esq., Assistant District Attorney, representing the Commonwealth.

John C. Pettit, Esq. and John T. Olshock, Esq., of the firm of Patrono, Ceisler, Edwards and Pettit, representing the Defendant.

Appendix A—Opinion of Court of Common Pleas.

OPINION

Terputac, J.
June 11, 1980.

On April 17, 1980, this court entered an order declaring a mistrial in the case of Commonwealth v. John Lee Whitt and directing that the case be retried in the May Term of Criminal Court. The defendant filed a Motion to Quash Indictment (sic) on May 1, 1980, on double jeopardy grounds to which the Commonwealth filed its Answer. After argument thereon, the court denied the motions to quash and to dismiss from which the defendant took an appeal to the Supreme Court of Pennsylvania. This opinion is written in support of our denial of such motions.

On September 24, 1979, the defendant, John Lee Whitt, was charged with the crimes of criminal homicide and murder. 18 Pa.C.S. 2501 and 2502 respectively, and counts of recklessly endangering (2507), aggravated assault (2702), and terroristic threats (2706). Jury selection began on Tuesday, April 8, 1980, before the Honorable John F. Bell, and continued through Wednesday, April 9th. The trial itself began with the taking of testimony on April 10th and a half day on Friday, April 11th.

On Friday evening, April 11th, Judge Bell became ill. Except for two out-patient visits to the hospital, he was confined to his home until Saturday, April 19th. Having been in contact with Judge Bell by telephone, Judge Thomas J. Terputac on Monday, April 14th, informed the jury and counsel that Judge Bell was ill and would not be available to try the case that day and that the jurors would be notified by phone when Judge Bell was

able to proceed.[1] At that time Judge Terputac was of the opinion that Judge Bell might be able to resume trying the case in a day or two. Day to day continuances were directed.[2]

At the hearing on Thursday, April 17th, Judge Terputac determined that Judge Bell was too ill to resume trying the case and made a finding of manifest necessity, thereby declaring a mistrial and rescheduling the trial for the May Term of Criminal Court, the first day of which would have been Monday, May 12th. Counsel for the defendant objected to the retrial, stating that a retrial would be costly to his client and that the Commonwealth would have the advantage and "opportunity to present its case again, and hopefully, to correct any errors or weak spots that may have been the result of the trial up to this point." N.T. April 17, 1980, hearing, p. 4. Claiming double jeopardy through the Fifth and Fourteenth Amendments, counsel asked that the charges be dismissed and the defendant discharged.

The double jeopardy clause of the Fifth Amendment of the Constitution of the United States is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969). It is clear that a constitutionally protected interest is inevitably affected by any mistrial decision. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed.2d 717, 98

[1] The April Term for court trials began on Monday, April 7, 1980, and would terminate on Friday, April 18th. President Judge Sweet handled civil cases, and Judges Gladden, Bell and Rodgers were assigned to criminal cases. Judge Terputac for the year was assigned Orphans' Court and Juvenile matters.

[2] Although the illness of Judge Bell was originally thought to be influenza, the ultimate diagnosis of Crohn's disease, a gastro-intestinal disorder, was not medically determined until April 23, 1980.

S.Ct. 824 (1978). The right of the accused to have his trial completed by a particular tribunal is based on important considerations such as the financial and emotional burden on the accused, the period of uncertainty which is prolonged by the prospect of retrial, and the possible enhancement of the risk that an innocent person may be convicted in such event. *Illinois v. Somerville,* 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066 (1973); *Green v. United States,* 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221 (1957). See 61 A.L.R.2d 1119. In assessing the scope of the double jeopardy problem, the United States Supreme Court has evolved the concept that the prosecutor must demonstrate "manifest necessity" for any mistrial over the objection of the defendant. *United States v. Perez,* 9 Wheat. 579, 6 L.Ed. 165 (1824). Although at times the words "manifest necessity", "evident necessity", or "imperious necessity" have been employed, the meaning appears to be the same. See *Downum v. United States,* 372 U.S. 734, 10 L.Ed.2d 100, 83 S.Ct. 1033 (1963). Although no mechanical formula has been espoused, *Illinois v. Somerville, supra,* a literal interpretation of the word "necessity" is not required; rather there are degrees of necessity by which the court is admonished to ascertain that a high degree of such necessity is reached before a mistrial is appropriate. *Arizona v. Washington, supra.* However, it is not the declaration of a mistrial which offends the rights of the defendant, it is the subsequent prosecution for the same offense which runs afoul of the Fifth and Fourteenth Amendments. *Commonwealth v. Carson,* 259 Pa. Superior Ct. 183, 393 A.2d 778 (1978).

Appendix A—Opinion of Court of Common Pleas.

The concept of manifest necessity has been incorporated into Pennsylvania law through the rules of criminal procedure. Pa. R. Crim. P. 1118(b) provides:

> "When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity."

Fundamentally the issue before the court is whether or not there was a manifest necessity for the declaration of the mistrial. Where the court has conducted an inquiry into the matter prior to the declaration of mistrial and has considered the circumstances, no abuse of discretion has occurred and reprosecution is permissible. *Commonwealth v. Bycer,* 254 Pa. Superior Ct. 336, 385 A.2d 1367 (1978). The defendant has relied principally upon *Commonwealth v. Ferguson,* 446 Pa. 24, 285 A.2d 189 (1971). In that case during the trial on one of the robbery charges, one of the victims became ill and was not available to testify. The District Attorney advised the trial court that Goldberg was a necessary witness on identification on all three indictments. Having contacted the attending physician for Goldberg, the District Attorney informed the court that the doctor could not say what Goldberg's condition was and he did not give a diagnosis. That same day the court granted the Commonwealth's motion to withdraw a juror—the equivalent of a mistrial under modern practice—and the case was later retried. Speaking for the Court, Mr. Justice O'Brien held that the facts in the case did not justify the granting of the mistrial.

We believe that the instant case differs materially from *Ferguson.* In *Ferguson,* the jury could have been sent home early for that day until more information could be elicited concerning Goldberg's health. The decision to declare the mistrial involved the health of a person unknown to the court and apparently to the District Attorney. In the instant matter the court held a short hearing on the Monday morning after the Friday evening when Judge Bell first became ill. After the court informed the attorneys that Judge Bell was ill and would not be available for that day, counsel for the defendant responded: "Your Honor, on behalf of the Defendant, we do not in any way question the illness of Judge Bell and we will enter into any stipulation Your Honor might recommend as to his illness." N.T. April 14, 1980, Transcript, p. 2. On April 16th, in chambers Judge Terputac held a meeting which was placed on the record. Having notified the parties about Judge Bell's continued illness, the court inquired whether counsel had any comments. Defense counsel stated he had no comment. Moreover, on that occasion the court advised counsel that the possibility of a mistrial was under consideration. On the next day, April 17th, the court declared a mistrial despite the objections of the defendant.

At no point in the proceedings did counsel for the defendant suggest or demand that the court secure a medical opinion of any sort. In fact, he admitted to the illness. For the first time, in the motion to dismiss, counsel argued that there was no "medical testimony as to the seriousness of the illness of Judge Bell" and that it "cannot be determined from the record whether Judge Terputac consulted with Judge Bell's attending physi-

cian." Paragraphs 12 and 13 of the Motion to Quash Indictment (sic).

Not only does the requirement of manifest necessity apply to the prosecutor but also it applies to the court. The court should not act hastily and should accord both to the prosecutor and to defense counsel "full opportunity to explain their positions on the propriety of the mistrial." *Arizona v. Washington, supra,* 54 L.Ed.2d at 734. We believe that abundant precautions were taken in the instant matter. The court monitored Judge Bell's condition each day. We warned both counsel that a mistrial was a likelihood if the illness persisted. In fact, on the day prior to the actual declaration of mistrial, we cautioned both sides that a mistrial was more than likely. At the time of the hearing on April 17th, the court permitted both counsel to advance reasons and factors which the court should take into consideration respecting the granting of a mistrial. Although the medical diagnosis was made much later, the court had before it such information of a substantial nature which permitted us to conclude that the illness would continue and that Judge Bell was unable to try the case. Unlike *Commonwealth v. Dull,* 257 Pa. Superior Ct. 192, 390 A.2d 777 (1978), the court did not act precipitously and declare the mistrial the same day upon which the illness became apparent.

In objecting to the proposed mistrial during the hearing of April 17th, defense counsel posited his reasons therefor on two bases: (1) that a retrial would be financially detrimental to his client, and (2) that the Commonwealth might be in a more advantageous position in being permitted to resubmit its case to the jury. Rather

than declaring a mistrial on Monday, April 14th, the court waited several days until Thursday, April 17th, at which time it was evident that Judge Bell would be unable to proceed with the trial in the foreseeable future. At no time did defense counsel ask or demand medical proof either by way of testimony or a medical report.[3] As a matter of fact, Judge Bell's condition deteriorated and he was compelled to undergo hospitalization in Washington Hospital from Saturday, April 19th, through April 27th. He returned to his judicial duties on April 28, 29 and 30th. He became ill again on April 30th and was hospitalized from May 1st to May 8th. By April 17th, it was physically impossible for Judge Bell to try the case and both counsel and this court knew it. In view of this state of affairs, defense counsel chose to focus his reasons for objecting to the declaration of mistrial on the two reasons explicitly stated on the record at the hearing of April 17th, N.T. 3, 4, and did not point to any reason based on lack of medical information respecting the precise medical condition of Judge Bell.

One of the two claims by defense counsel advanced at the hearing on the mistrial was that the Commonwealth may be able to prepare its case for retrial with greater efficacy. We find that this argument has no support in the record. The prosecutor has done nothing to delay the case or to prevent it from going to the jury. Nothing in the trial testimony would lead to any conclusion that the Commonwealth was attempting by some devious means

[3] At the hearing on April 17th, N.T. p. 4, defense counsel said: "I do not question whether Judge Bell is sick or not. On behalf of the Defendant, we are willing to accept the statement of Your Honor that Judge Bell is sick. To what degree of seriousness or the length or duration of his illness, we know nothing other than what this Court has stated."

to retry the case. We conclude that this claim on behalf of the accused is nothing but pure speculation lacking any merit in the resolution of the issues. The second argument advanced at the mistrial hearing concerns the issue of the burden of additional expense. Such a situation is always prevalent where private counsel has been retained. In this case, defendant Whitt has been free on bond and has been working at his regular employment. For three of the four days during which the case was continued due to the illness of the trial judge, defendant was at work and was not required to appear in court. To this extent the financial burden has been mitigated. Nevertheless, we must view all the circumstances of the occasion for retrial, weighing the public interest against the rights of the accused. "Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington*, 53 L.Ed.2d at 728.

There is sufficient authority to indicate that the illness of the trial judge justifies the discharge of the jury and such event does not bar a further prosecution of the defendant. 21 Am.Jur.2d, Criminal Law Sec. 197. "Mistrials triggered by illness of the defendant, defense counsel, or the trial judge have been upheld even without

the defendant's consent. These mistrials were accepted uncritically as 'necessary' even though possibilities for a continuance, replacement of trial counsel, or replacement of the judge had not been explored at the trial." 125 University of Pennsylvania Law Review, Jeopardy and Mistrials, pp. 477, 478 (1977). In *Commonwealth v. Robson*, 461 Pa. 615, 337 A.2d 573 (1975), cert. denied, 423 U. S. 934, 46 L.Ed.2d 265, 96 S. Ct. 290, the Supreme Court held that the illness of the trial judge constituted manifest necessity for the declaration of a mistrial.[4]

For the reasons herein stated, and having considered all the circumstances attending the illness of Judge Bell, we believe that the finding of manifest necessity for the declaration of the mistrial was proper.

THOMAS J. TERPUTAC
Judge

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[4] No one proposed prior to the declaration of mistrial that one of the other members of the local court should have been substituted for Judge Bell. As a practical matter, the writer had a full schedule with Orphans' Court and juvenile cases for the full two week period. The remaining members of the court had civil and criminal trial commitments for that same time. Consequently, during the final few days of the April Trial Term, replacement of the trial judge was simply not a viable alternative.

APPENDIX B

Memorandum—Order of Supreme Court of Pennsylvania Affirming Denial of Motion to Quash Indictment (April 15, 1981)

SUPREME COURT OF PENNSYLVANIA
Western District

COMMONWEALTH OF PENNSYLVANIA,

v.

JOHN LEE WHITT,

Appellant.

No. 80-1-104
ARGUED: March 2, 1981

Appeal from the Order of the Court of Common Pleas of Washington County, Criminal, at Nos. 602 and 1104 of 1979.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF WASHINGTON COUNTY, be, and the same is hereby affirmed.

BY THE COURT:

CARL RICE, Esquire
Prothonotary

Dated: April 15, 1981

APPENDIX C

Constitutional Provisions Involved

United States Constitution

Article III, Section 1

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavious, and shall, at stated times, receive for their Service, a Compensation, which shall not be diminished during their Continuance in Office.

Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual ser-

vice in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.